ORIGINAL

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1983

No. 83-511

THE CONTINENTAL GROUP, INC.

Petitioner,

v.

VERONICE A. HOLT

Respondent,

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

VERONICE A. HOLT, ESQ.
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QUESTION PRESENTED

Whether in an action by a private paintiff, who is a real party in interest, *City of Los Angeles v. Lyons,* U.S. , 103 S. Ct. 1660 (1983), a case upholding the traditional notion that federal courts should exercise restraint in interfering with the police function, a function that under our system of federalism is primarily reserved to the state governments, should be a relevant consideration in determining whether the plaintiff has standing to maintain the action.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

OTHER

REASONS FOR DENYING THE WRIT

1. Continental's argument fails to recognize the underlying premise in *Lyons* that the delicate balance between federal and state powers prohibited the granting of *any* injunctive relief on behalf of Lyons, whether such relief be in the nature of a request for a preliminary or permanent injunction.

> "We decline the invitation to slight the preconditions for equitable relief; for as we have held, recognition of the need for a *proper balance between state and federal authority counsels restraint in the issuance of injunctions against state officers* engaged in the administration of the states' criminal laws in the absence of irreparable injury which is both great and immediate. *(Citations admitted)* ... In exercising their equitable powers federal courts must recognize "the special delicacy of the adjustment to be preserved between federal equitable power and State adsministration of its own laws." *City of Los Angeles v Lyons* 103 S.C. 1660, 1670. (198) (Empahsis added)

This case does not invlove questions of federalism. It involves soley questions concerning enforcement of private rights pursuant to a statutory scheme expressly committing resolution of problems of employment discrimination to the federal courts. Holt is not asking this Court to declare a state statute or practice illegal. Continental's efforts to compare *Lyon's* and Holt is simply an effort to confuse the legal issues of this case by glibly citing precedents without reference to the underlying legal reasoning. Moreover, Continental's argument is based upon the incorrect assumption that *Lyons* changed law of standing. *Lyons* merely reiterated

principles well established in *O'Shea v. Littleton*, 414 U.S. 488 (1974) and *Rizzo v. Goode* 423 U.S. 149 (1973). Continental, never having raised the question of standing in the lower courts, would have us believe that the Court of Appeals for the Second Circuit created grievous error by failing to consider a new precedent. This assertion that *Lyons*, established a new legal precedent runs afoul of the majority's clear statement to the contrary in the opinion:

> "No extension of *O'Shea* and *Rizzo* is necessary to hold that respondent Lyons has failed to demonstrate a case or controversy with the City that would justify the equitable relief sought. 103 S. Ct. 1667

II. Holt, as the "real party in interest" in a private action which does not raise constitutional questions, has standing.

Although Continental's argument is rather obtuse, the essential core of its arugment appears to be that Holt lacks standing because the Court of Appeals held that the district court should consider factors other than financial harm to Holt in determining whether the preliminary injunction should issue:

> "However, the claim in this case is not simply that an employee has been discharged and thereby has suffered injuries normally compensable by money. In addition, the plaintiff (Holt) asserts that the discharge was in retaliation for her prior claim of a Title II violation by her employer. A retaliatory discharge carries with it the distinct risk that other employees may be deterred from protecting their rights under the Act or from providing testimony for the

> plaintiff in her effort *to protect her own rights.* These risks may be found to constitute irreparable injury." ***Holt v. The Continental Group,*** 708 F.2d 87, 91 (A-7) (Emphasis added)

In essence, Continental argues, with the utmost legal absurdity, that because the Court of Appeals held that the District Court on remand should consider whether terminating Holt might deter other employees from protecting their rights or assisting her in the prosecution of her charge, Holt is without standing to pursue injucntive relief for her own benefit.

A. Continental's assertion that Holt lacks standing is based upon a misaprehension of the concept of standing.

As a general rule, questions of standing arise only in actions against governmental entities:

> "Standing doctrines are employed to refuse to determine the merits of a legal claim, on the ground that even though the claim may be correct the litigant advancing it is not properly situated to be entitled to judicial determination. Both in its flowering and subsequent withering, this concept of a need to establish an entitlement to judicial action, separate from proof of the substantive merits of the claim advanced, has been largely a creture of twentieth century decisions of the federal courts. More important, *it has been very much tied to litigation asserting the illegality of governmental action* whether the assertion has been that executive or administrative action is beyond the limits of statutory authorization or has been that a statutory authorization has exceeded constitutional limits. Claims of private wrongdoing ordinarily are asserted by persons obviously having an enforceable interest, if anyone has; such problems as arise commonly are handled in terms of defining private causes of action or of identifying the ***real party in interest.*** ***Moore's Federal Practice Section 3531.***

(Emphasis added)

The concept of standing is firmly rooted in the notion that courts should not act as a superlegislature. Federal courts should refrain from determining constitutional questions *unless* determination of the constitutional issue is critical to determining an actual case or controversy which cannot be adjudicated without resolution of constitutional questions. The essence of standing is that it is the door to judicial review. At the very inception of our judicial system, Chief Justice Marshall recognized that while courts must inherently, have the power to determine the constitutionality of laws passed by the legislative and executive branches, they must only exercise that power of judicial review in actual cases or controversies where decision of the constitutional issue is essential to resolution of the dispute before them. See *Marbury v. Madison* 1 Cranch 137, 2 L.Ed. 60.

The modern development of the concept of standing is primarily traced through three cases: *Frothingham v. Mellon*, 262 U.S. 447 (1923), *Baker v. Carr*, 369 U.S.186 (1962) and *Flast v. Cohen*, 392 U.S. 83 (1968). These cases all address the question of standing to seek equitable relief against a governmental entity as a private attorney general asserting the unconstitutionality of governmental action. Taken together, they stand for the proposition that the equitable jurisdiction of the federal courts does extend to cases and controversies brought by private persons who assert governmental deprivation of constitutionally guaranteed private

rights. Mrs. Frothingham, who asserted the state's interest in its legislative perogative lacked standing. On the other hand, the plaintiffs in *Baker* and *Flast* who asserted violation of their Fourteenth and First Amendment rights, respectively, had standing. Ultimately the question of standing is one of the status of the party seeking judical review of governmental action.

B. Holt meets the test of standing

Subsequent to *Baker* and *Flast*, this Court in *Association of Data Processing Service Organizations v. Camp* 397 U.S. 150 (1970) set forth a threefold test for determining standing:

1. Does the plaintiff allege that the challenged action has caused him "injury in fact", economic or otherwise?

2. Is the interest which the plaintiff seeks to protect "arguably" within the "zone of interest which the plaintiff seeks to protect?

3. Has judicial review been precluded?

Holt clearly meets this test. She has been injured in fact. The interest she seeks to protect, employment is clearly within the "zone of interest" of Title VII. Judicial review has not been precluded.

a. Injury In Fact

Holt has suffered "economic injury in fact". Her employment was terminated and continues to be terminated. As detailed in her affidavit in support of her motion in *forma pauperis* filed in this Court, not only is Holt threatened with econo-

mic injury--she is rapidly approaching economic ruin. Holt is "otherwise injured in fact". She is injured by the deprivation of her statutory right to be free from retaliation in the pursuit of her Title VII charges. She is injured by intimidation in the prosecution of her charges. As Holt pointed out in her brief to the Second Circuit, one of the reasons proffered in support of Holt's termination was her written response to her performance review given subsequent to the filing of the original discrimination charges. Continental considered the mere confidential writing by Holt of her response to her performance review to be a breach of its "trust and confidence" meriting termination "regardless of its accuracy". In fact, Continental deemed its trust and confidence to be breach even though Holt, mindful of confidentiality considerations afforded it a prior opportunity to comment on the document *prior* to its submission to the State of Connecticut Commission on Human Rights and Opportunities. When an employer charged with discrimination asserts that the mere confidential writing of statements regarding discriminatory conduct is grounds for termination, *how can Holt, or any other charging party, having herself been terminated for asserting her rights "regardless of...accuracy", ask her former co-workers to put aside their concerns for themselves, their careers, and their families to testify in her behalf knowing that their testimony would subject them to termination?*

Further, we need not speculate as to whether Holt has been "injured in fact" by the termination. In the nearly two years proceeding her termination, she has been unable to obtain employment in her field, notwithstanding the fact that she has excellent academic credentials and had, prior to the filing of the charges, never received less than an "outstanding" performance rating in her seven years employment with major industry.

"Blackballing" is a practice that occurs in secret and that no Title VII litigant will probably ever be able to prove; however, in the instant case it is the specific assertion of Holt in the record that on two occasions Continental's General Counsel specifically stated to her *prior* to the filing of her charges, that if she filed charges, it would "ruin her career". (App. 27, 32-33) Events subsequent to the filing of Holt's charges have surely proven this statement to be more than idle conversation.

Just as we need not speculate whether Holt's termination has resulted in "injury in fact", we need not speculate whether Continental *intended* Holt's termination to act as a barrier to the full and free investigation of her charges. Subsequent to the termination of Holt and the commencement of this action, William Kandel of Skadden Arps, Continental's Counsel in this matter, telephoned Holt to specifically inform her that she should have no furher contact with Continental's employees. (App. 469)

Defendant even sought to have the record in the District

Court sealed, and to have the courtroom closed to the public during the hearing. (App. 466) When an employer fires an employee with an exemplary record three months after the filing of her charges, tells the terminated employee to refrain from futher contact with other employees, and then attempts to impose a "blackout" on subsequent judicial proceedings, no explanation except a consciously planned effort to "chill the exercise" of the employee's rights is available to characterize the employer's conduct. Holt is not "speculating" that Continental intends to "chill the exercise" of her statutorily guaranteed rights, she is asking this Court to enjoin Continental's present, continuous and irreparable injury to the assertion of her rights caused by the termination of her employment.

Further in this regard, it should be noted that Continentals's assertion in its Brief in Opposition to Holt's Cross Petition at page 4 that "the First Amendment is in no way implicated or alledged in Holt's claim or in Continental's reasons for discharging her her.", is incorrect. At the hearing in the District Court, Holt specifically addresed her First Amendment concerns.

> "I would also point out that one of the underlying rationale in some of the cases granting preliminary injunctions is to the extent to which a termination during a Title VII proceeding will unfairly impinge upon the plaintiff's First Amendment Rights.
>
> In this particular case, *Plaintiff is concerned that there is some consideration on the part of the Defendant to impinge upon*

> *her first Amendment Rights.* Specifically, Plaintiff received a letter from the personnel manger of the Defendant corporation with respect to her savings plan.
>
> Plaintiff called the personnel manager to ask him about election of the savings plan. Subsequently, *Plaintiff received a telephone call from Defendant's counsel, instructing her that she should not have any communication with Defendant's employees except if she had those communications through him." (Emphasis added)* (App. 469)

Continental misrepresents Holt's position in order to assert that ***Elrod v. Burns*** 427 u.S. 347 (1976) is not applicable to the instant action because, it asserts, ***Elrod*** only concerns First Amendment freedoms, and no other forms of protected activity.

Exercising Title VII rights obviously requires speech, written or verbal. In "chilling the exercise" of Holt's Title VII rights, Continental inherently chills the exercise of activity protected by the First Amendment. Of course, Continental, a private "person", not a governmental entity, is not directly subject to the proscriptions of the First Amendment; however, the Civil Rights Acts of 1866 and 1870, 42 U.S.C. Section 1981 *et. seq.* (specifically pled by Holt A-22, 45 and 46) is applicable to private persons, ***Jones v. Alfred H. Mayer Co.*** 392 U.S. 409 (1968) including Continental.

Finally, in this case, there is uniquely conclusive evidence that Continental acted with intent to retaliate, to injure Holt in the assertion of her rights guaranteed by Title VII. Although proof of intent is not required to establish liabi-

lity under Title VII, there can be no doubt in this case that from the very moment Continental received notice of Holt's charges, it embarked upon a concerted plan to use unlawful means to defend against the charges.

Continetal's first act in response to the charges was to hired Skadden Arps in clear contravention of the Code of Professional Responsibility (which has been enacted into statute in both of the relevant jurisdictions, Connecticut and New York). Not only did Continental hire the law firm that was advising Holt in the daily performance of her job to defend against employment discrimination charges arisng out of that job, Continental hired Skadden Arps (and Skadden Aprs accepted the representation) *secretly*, without disclosure to Holt.

Now, at this late point in these proceedings, Continental realizes that secret retention of Skadden Arps makes its conduct indefensible. To cure this problem, it actually misstates the record below in it pleadings in this Court:

> "The record indicates that Holt's assertion of an attorney-witness ground for disqualification is based on a telephone conversation she had initiated with a Skadden, Arps lawyer months after being *notified* of the law firm's role as defense counsel in her action." Continental's Brief in Opposition to Holt's Cross-Petition at page 6. (Emphasis added)

Continental understandbly does not cite any reference to the record in support of this statement. There is absolutely no support in the record for this statement. Counsel has sewn

it of whole cloth to cover its blatant unethical and unlawful conduct. The *only* statements in the record concerning the retention of Skadden Arps are those of Holt who unequivocally states that her knowledge of Skadden Arps representation of Continental in the discrimination charges "was derived from supposition":

> "Skadden Arps was subsequently retained, *without disclosure* to Plaintiff (Holt), to represent Defendant/Respondent (Continental) in the discrimination charges. (Holt's) knowledge of Skadden Arps representation was *derived from supposition*. Specifically, she observed Mr. Kandel at the Stamford offices of (Continental) shortly after the receipt of her charge. As she had never observed Mr. Kandel's prior appearance at the Stamford offices, and knew that Mr. Kandel's primary area of practice was employment discrimination, she assumed that he had been retained to respond to the charges filed with the CHRC.
>
> On Friday November 13, 1982, when (Holt) was informed by Steve Bermas (Continental's Associate General Counsel and Holt's immediate superior) that the complaints filed with the CHRC had been received, she stated her *supposition*, and he confirmed it." (App. 616)

This statement by Holt is the only statement in the record concerning how Holt obtained knowledge of the Skadden Arps representation of Continental in the discrimination charges. More importantly, the Code of Professional Responsibility requires something substantially greater than *notification* of "differing interest".

> "DR 5-501 Refusing to Accept or Continue Employment if the Interest of Another Client May Impair the Independent Professional Judgment of the Lawyer.
>
> (A) A lawyer shall decline proffered employment if the exercise of his independent profes-

> sional judgment in behalf of a client will be or is likely to be affected by the acceptance of the proffered employment, *or if it would be likely to invovle him in representing differing interest*, except to the extent permitted under DR 5-105(C)
>
> * * *
>
> (C) In situations covered by DR 5-105 (A) and (B), a lawyer may represent mutltiple clients if it is obvious that he can adequately represent the interest of each and *if each consents to the representation after full disclosure* of the possible effect of such representation on the exercise of his independent professional judgement on behalf of each. (Emphasis Added)

Even with its effort to improve the facts with a statement unsupported in the record, Continental is not so bold as to say that it made any effort to actually comply with the clear requirement of the Code of Professional Responsibility, *disclosure and consent.*

The simple fact is that upon receipt of Holt's charges, Continental decided to use every means available, without regard to legality, to prevent the exercise of Holt's rights under Title VII, and it now has the ultimate audacity to come into the highest Court of the nation and assert a ***constitutional right to continue its unlawful conduct free from judicial scrutiny***, which right it is willing to support by misrepresentation of the record.

Holt has been injured in fact, economic and otherwise, and she continues to be so each and every day that the unlawful termination of her employment in retaliation for asserting her statutory rights is allowed to continue.

2. <u>The Zone of Interest</u>

The purpose of Title VII is provide a statutory gaurantee

against employment discrimination. In Section 704(a), Congress specifically legislated retaliation for filing employment discrimination charges to be a violation of the Act. The interests which Holt seeks to protect are precisely the interests guaranteed by the statute in question.

3. Preclusion of Judical Review

Generally, the question of preclusion of review as a grounds for denying standing focuses upon whether there is an express constitutional or statutory provision proscribing judicial review of a particular act of a governmental entity. Most often, preclusion is only an issue in cases involving questions of administrative procedure, as in ***Associated Data Processing Service Organizations***, supra.

Surely, in this case, there is no question of preclusion. In fact, the responsible governmental agency, The Equal Employment Opportunity Commission appeared as *Amicus Curiae* in the Court below to urge the granting of injunctions to stay retaliatory terminations.

C. Continental's argument fails to recognize that threshold considerations of standing are not present where the plaintiff is the real party in interest

Although as analyzed above, it is quite clear that Holt could meet the relevant test for determining standing, it is equally clear that considerations of standing are not present in this case. Questions of standing only arise where there is an issue as to whether the plaintiff has a "personal stake in

the outcome" *Baker*, supra at 204.

The standing cases, including *Lyons*, involve on the one hand, private plaintiffs seeking to enjoin future governmental conduct which they assert will improperly impinge upon some protected activity in which they intend to engage in the future, and on the other hand, a governmental defendant asserting either separation of powers or federalism as a defense. Determination of standing or lack of standing balances the right to obtain judical review of unconstitutional or unlawful conduct by the sovereign against the right of the sovereign to conduct the functions of government expressly committed to it under the constitution.

Thus in *Baker*, the State of Tennessee had a clear right to apportion its legislative districts, but plaintiffs had an equal right to have their vote equally counted. Likewise, in *Flast*, plaintiff, whose First Amendment rights were "arguably" abridged by the Congress's exercise of its power to "tax and spend" had standing.

In balancing bewteen the rights of citizens and the rights of governmental entities, the one area in which this Court has traditionally been most reluctant to use its equitable powers is in cases involving intrusion upon state exercise of its police power. *O'Shea*, *Rizzo*, and now *Lyons*, form a clear line of authority that stand for the proposition that standing to enjoin police conduct as uncon-stitutional exists only when:

1. The conduct challenged is clearly pursuant

to official policy.

2. The conduct challenged, if proven, would be clearly unconstitutional.

3. The threat of future unconstitutional activity by the police is substantial, and *the plaintiff is likely to be the target of that conduct.*

Thus, in *Lyons*, the majority clearly stated the basis upon which Lyons *would have* standing to seek the injunctive relief he requested.

> "In order to establish and actual controversey in this case, Lyons would have had not only to allege that he would have another encounter with the police but also to make the incredible assertion either, (1) that *all* police officers in Los Angeles choke any citizen with whom they happen to have an encounter, whether for the purpose of arrest, issuing a citation or for questioning or, (2) that the City ordered or authorized police officers to act in such manner. 104 S. Ct. at 1666 (Emphasis in original)

Thus, even in the area of state exercise of its police power where this Court has imposed a very exacting test of standing, it has not been willing to say that standing *per se* is unavailable to a class of plaintiffs.

More importantly, these cases are totally irrelevant to the case at bar. They have been set forth in detail soley for the purpose of throughly examining defendant's argument. Having looked at these cases it is clear that they provide no illumination on the case at bar in which the plaintiff, Holt, asserts a private right of action and defendant, Continental, is a public corporation, not a police department.

What is relevant here is that Holt is the real party in in-

terest in this litigation. Her suit is not to enjoin Continental from terminating other charging parties in the future--it is to enjoin her current termination.

This Court has not been called upon to determine whether in private actions between private citizens, the plaintiff has standing, probably because as ***Moore***, supra, observed "Claims of private wrongdoing ordinarily are asserted by persons *obviously* having an enforceable interest..."

This Court has been called upon in ***Trafficante v. Metropolitan Life Insurance Company*** 409 U.S. 205 (1972) to determine whether private plaintiffs, who were arguably not real parties in interest had standing to sue a private defendant for violation of the Civil Rights Act of 1968 prohibiting discrimination in housing. Plaintiffs, white citizens, had not been discriminated against. They asserted that defendant Metropolitan had injured them by its discriminatory housing policy by depriving them of the benefits of living in an integrated community. The District Court dismissed their action for lack of standing. This Court reversed. Under the relevant statute, suit could be brought by any person injured by a discriminatory housing practice. Plaintiffs claimed injury; therefore, they had standing.

In his concurring opinion, Justice White notes that absent the statute, he would have great difficulty finding that the "petitioners' complaint in this case presented a case or controversy within the jurisdiction of the District Court under Art. III of the Constitution." 409 U.S. 212; however,

because he would sustain the statute's extension of jurisdiction to "those in the position of the petitioners", he concurs in the determination that petitioners had standing.

The essential point not to be missed in *Trafficante* is that Congress can, within the limits of Article III extend standing to private citizens to litigate a public wrong even when they seek to litigate claims not tradionally recognized as personal injury.

Thus, not only does Holt have standing in her own right to seek injunctive relief for the injury to her, loss of her employment, she may assert injury to others whose rights may have been breached by the statutory violation. In its reasoning in *Trafficante*, this Court stated in support of its finding that petitioners, though not direct victims of discrimination, had standing:

> "Since HUD has no enforcement powers and since the enormity of the task of assuring fair housing makes the role of the Attorney General in the matter minimal, the main generating force must be private suits in which, as the Solicitor General says, the complainants act not only on their own behalf but also as private attorneys general in vindicating a public policy that Congress considered to be of the highest priority.' The role of "private attorneys general" is not uncommon in modern legislative programs." 409 U.S. 211.

Likewise in Title VII litigation, this court has expressly recognized the role of private litigants in "vindicating congressional policy".

> "In addition to reposing ultimate authority

> in the federal courts, Congress gave private individuals a significant role in the enforcement process of Title VII. Individual grievants usually initiate the Commission's investigation and conciliation procedures...*In such cases the private litigant not only redresses his own injury but also vindicates the important congressional policy against discriminatory employment practices.*" *Alexander v. Gardner-Denver Company*, 415 U.S. 36 44-45 (1974)

Just as the petitioners in *Trafficante* had standing pursuant to a statutory scheme to vindicate congressional policy against housing discrimination, Holt who is also the real party in interest has standing to vindicate congressional policy prohibiting retaliation for filing charges of employment discrimination. Of course, it is not really necessary to reach this issue since Holt is the real party in interest and her standing to assert harm to herself is "obvious".

D. Standing is an *aspect* of justiciabilitly, a limitation on federal judicial power. Continental having expressly *conceded* jurisdiction is now challenging an issue which it has already conceded.

> "The jurisdiction of federal courts is defined by Article III of the Constitution...the judicial power of federal courts is constitutionally restricted to 'cases' and 'controversies'...Embodied in the words 'cases' and 'controversies' are two complementary but somewhat different limitations. In part those words limit the business of federal courts to questions presented in an adversary context and in a form historically viewed as capable of resolution through the judicial process. And in part those words define the role assigned to the judiciary in a tripartite allocation of power to assure that the federal government will not intrude into areas committed to the other branches of government. *Justiciability is the term of art employed to give expression to this dual*

limitation placed upon federal courts by the case and controversy doctrine.

Standing is an aspect of justiciability, and as such, the problem of standing is surrounded by the same complexities and vagaries that inhere in justiciability...*The fundamental aspect of standing is that it focuses on the party seeking to get his complaint before a federal court and not on the issues he wishes to have adjudicated...In other words, when standing is placed in issue in a case, the question is whether the person whose standing is challenged is a proper party to request an adjudication of a particular issue and not whether the issue itself is justiciable. Flast*, supra 392 U.S.at 94-95, 99 (Emphasis added)

In *Sampson v Murray*, 415 U.S. 61, this Court expressly recognized that District Court's have jurisdiction to entertain a request of a terminated employee for preliminary injunctive relief. It so held despite the fact that Sampson did involve considerations of separation of power, thereby invoking one of the traditional grounds for denial of standing. The logical absurdity of Continental's position is well illustrated by the fact that on the one hand it relies on *Sampson* to establish that the financial harm to Holt can not be recognized as "irreparable injury" supporting the issusance of an injunction, while at the same time ignoring the express statement in Sampson that the District Court had jurisdiction.

"We agree with the Court of Appeals that the District Court is not totally without authority to grant interim injunctive relief to a discharged Government employee, but conclude that, judged by the standards which we hold must govern the issuance of such relief, the issuance of the temporary injunctive relief *in this case* cannot be sustained." 415 U.S. 63. (Emphasis Added)

Despite the clarity of this Court's statement that it had jurisdiction in ***Sampson***, Continental now asserts the exact opposite, that District Court's do not have jurisdiction to entertain employee suits for preliminary injunctive relief, because termination of employment cannot result in irreparable injury.

Continental arrives at this conclusion without any statement of the legal logic implicit in this result. First, holding that Holt does not have standing and therefore, the District Court does not have jurisdiction, would reverse this Court's specific determination of jurisdiction in ***Sampson***, as well as ***Elrod v Burns***, supra.

Secondly, it would required that lack of "extraordinary circumstances", the ***Sampson*** standard, be conclusively presumed as a matter of law, rather than determined as matter of proof. A determination that Holt lacks standing requires that this Court determine as a matter of law, rather than fact, that Holt, or for that matter any Title VII claimant who is a victim of retaliatory termination, *could not* have been irreparably injured by a summary termination.

Finally, Continental is asking that this Court hold that the irreparable injury resulting from a retaliatory termination is *per se* speculative. Continental is not asking this Court to hold that Holt has failed to demonstrate irreparable injury resulting from her termination: It is asking this Court to hold, as a matter of law, without regard to the facts of the case, that Holt could not have been, and cannot be, ir-

reparably injured by summary retaliatory termination.

The fallacy of Continental's position appears to be rooted in a failure to distinquish the difference bewteen jurisdiction to entertain a complaint and judicial determination whether under the facts of the case, the relief requested *should be* granted.

It is not suprising that Continental wishes to employ a jurisdictional bar to avoid determination of the merits (Holt's likelihood of success and injury in fact). Continental's conduct in this case was so egregious that, since the submission of Holt's proof in the District Court, Continental has declined all invitations to argue the likelihood of success on the merits. In the District Court, following Holt's presentation of the record supporting her likelihood of success on the merits, Continental declined to argue the question of likelihood of success on the merits. (App. 572)

In the Court of Appeals, Continental declined to make any argument whatsoever in support of its termination of Holt. It merely submitted itself to questioning by the Court. More importantly, in response to questions raised by the panel, Continental's attorney stated that ***Continental "conceded" that the District Court had jurisdiction over Holt's case under 42 U.S.C. Section 1981.***

Since standing is a subset of jurisdiction, Continental having admitted jurisdiction in the Court of Appeals, now comes to this Court to seek reversal of a judicial deter-

mination of jurisdiction *which it has expressly conceded.*

Yes, Continental actually has the temerity to suggest that the Second Circuit was in error for failing to consider that Holt did not have standing, after it has already conceded the issue in open court.

Questions of jurisdiction address themselves singly to whether courts have the power under the constitution, and statutes properly enacted pursuant to it, to hear the plaintiff.

Since standing is a subset of jurisdiction, this Court's determination that it had jurisdiction in *Sampson*, necessarily included a determination that plaintiff, the terminated employee, had standing. The mere fact, however, that she had standing did not entitle her to the grant of the injunction. She had not presented any evidence to support a finding of irreparable injury and further, the right she sought to protect, assurance of due process in her termination, was viewed by the majority as de minimus when balanced against considerations of separation of power.

Holt, however, seeks to protect a very important right, the right to proceed under Title VII free from employer retaliation. Holt has been and continues to be irreparably injured in a case involving more than mere loss of employment. Holt has standing. The federal Court have jurisdiction.

CONCLUSION

This Court should deny Continental's Petition for Writ of

Certiorari, and grant the injunctive relief requested by Holt in her Cross-Petition. The requirement that a plaintiff have standing does not impose a barrier to relief in this case. Plaintiff, as the real party in interest, seeking to litigate a private right of action in a case that does not involve considerations of federalism or separation of powers, unquestionally has standing.

It should do so summarily. In light of the egregious conduct of Continental, it is obvious that Holt has a very high likelihood of success on the merits. Finally, Holt has obviously been irreparably harmed, and continues to be harmed. Holt has spent the last two years of her life living under a stigmatism arising from Continental's unlawful conduct. No future award of money damages can ever restore the two years of the prime of Holt's professional career development that she has lost. They are gone forever, irreparably lost. Holt continues to be ireparably injured each and every day that Holt's termination continues. Additionally, Holt is not suffering any ordinary financial harm. Holt is legally insolvent and lives every day under the real threat of bankruptcy. No court in equity could countenance the continuation of the inequities that have been visited upon Holt.

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PROOF OF SERVICE - AFFIDAVIT

I, Veronice Holt, Respondent, *pro se,* herein, hereby certify that on the 5th day of January, 1983, I deposited in the United States Post Office located at Stamford CT, with postage prepaid, in a duly addressed envelope, to Jeffrey Glekel, Counsel of Record for Petitioner, The Continental Group, Inc., a copy of the foregoing Brief in Response to Petition for Writ of Certiorari to the United States Court of appeal for the Second Circuit.

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Subscribed and sworn to before me at Stamford Ct on this 4th day of January, 1984.

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MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS

Respondent, Veronice A. Holt, request leave to file the attached reponse to a petition for writ of certiorari without prepayment of costs and to proceed in forma pauperis. Respondent did not request permission to proceed in forma pauperis in either the United States District Court or the United States Court of of Appeals for the Second Circuit. Respondent did request permission to proceed in forma

pauperis in her cross petition filed in this court, No. 83-5586.

Respondent's affidavit in support of this motion is attached hereto.

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1983

No. 83-511

THE CONTINENTAL GROUP, INC.

Petitioner,

v.

VERONICE A. HOLT

Respondent,

AFFIDAVIT IN SUPPORT OF MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS

I, Veronice A. Holt, being first duly sworn according to law, depose and say that I am the Respondent in the above-entitled case; that in support of my motion to proceed without being required to prepay fees, costs or give security therefore, I state that because of my poverty I am unable to pay costs of said case or to give security therefore; and that I sincerly believe I am entitled to redress.

I further swear that the responses which I have made to the questions and instructions below relating to my ability to pay the cost of proceeding in this Court are true.

1. Are you curently employed?

This matter arises out the termination of my employment in January, 1981. Since that time, with the exception of a four month period during which I was employed as a long-term substitute teacher, I have been unable to secure any full-time permanent employment. I currently work as a temporary secretary on the days when I am able to secure employmnet through various temporary agencies. If I am able to obtain employment for the entire week, I earn approximately $280 after deductions; however, because of the length of my unemployment, this amount is insufficient to meet my current obligations and as, further discussed below, I have substantial past due obligations, upon which suit by creditors is threatened.

During the month of December, 1983, I have also been employed as part time "Christmas-help" in a department store. This employment results in an income of approximately $80.00 per week.

I continue to seek full-time employment and will withdraw this request, if during the pendancy of these procedings, I become financially solvent.

2. Have you received within the past twelve months any

income from a business, profession or other form of self employment, or in the form of rent payment, interest, dividend or other source?

I own one share of stock in the Petitioner, The Continental Group, Inc., upon which I receive a quarterly dividend in the amount of $.65. I previously owned approximately ninety share of stock in that corporation, but they were sold in July and October of 1982 in order to meet financial obligations.

At the time of my termination, I had savings in the amount of approximately $8,000, in interest bearing accounts.

As a result of my termination, I forfieted approximately $5,000 in savings in an employer sponsored savings plan.

During the month of October, 1983, I earned $1,000 for a free-lance writing assignment. This amount was applied to the payment of my debts. I have not had any other form of self-employment during the past two years.

3. Do you own any cash checking or savings account?

The average current value of my cash accounts is approximately $150.

4. Do you own any real estate, stocks, bonds, notes automobiles, or other valuable property (excluding

ordinary household furnishings and clothing)?

I own a condominium which is my primary place of residence, the purchase price of which was approximately $67,000 in 1978. There is a mortgage in the amount of $60,000 on the condominium, which is currently approximately $4,000 in arrears. I own an automobile which is approximately seven years old and fully paid for.

I also owe approximately $2,000 to Commercial Credit Corporation on a loan which is approximately ten months in arrears; $1,000 to American Express Company which is approximately twelve months in arrears; and $350 to Carte Blanche Corporation which is approximately twelve months in arrears.

5. List the persons who are dependent upon you for their support and state your relationship to these persons.

I am the only person who is dependent upon me for support.

I understand that a false statement or answer to any question in this affidavit will subject me to penalties for perjury.

VERONICE A. HOLT, ESQ.
Pro Se

#12A 44 Strawberry Hill
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Subscribed and sworn before me this 4th day of January 1984

[illegible] JR
NOTARY PUBLIC
MY COMMISSION EXPIRES MARCH 31, 1989